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No. 80-779

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

CONCERNED JEWISH YOUTH,

Petitioner,

-against-

ROBERT J. McGUIRE, in his official capacity as Police Commissioner of the City of New York, EDWARD KOCH, in his official capacity as the Mayor of the City of New York, and the NEW YORK CITY POLICE DEPARTMENT,

Respondents.

SUPPLEMENTAL BRIEF TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

SUPPLEMENTAL BRIEF TO PETITION FOR A WRIT OF CERTIORARI 1

APPENDIX: OPINION OF NEW YORK STATE SUPREME COURT IN MILLAN HOUSE, INC. v. MURPHY A-1

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Petitioner, Concerned Jewish Youth, files this, its Supplemental Brief, pursuant to Rule 22.6 of the Rules of this Court, to call attention to a decision by the New York State Supreme Court on the merits in Millan House, Inc. v. Murphy, as reported in the New York Law Journal for

November 20, 1980, on page 10, column 4, which is reprinted in the appendix hereto.[1] The decision was rendered after the Petition for a Writ of Certiorari was filed on November 14, 1980 and concerns demonstrations at the Mission of the Union of Soviet Socialist Republics to the United Nations ("Soviet Mission") which is the subject matter of the Petition for Certiorari. Petitioner was not a party to the state court proceeding.

In 1971, a preliminary injunction was issued in Millan House, Inc. v. Murphy concerning demonstrations at the Soviet Mission. That preliminary injunction is discussed at pages 7, 8, 9, 10, 16 and 18 of the Petition for a Writ of Certiorari.

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[1] Petitioner has accurately reproduced the text of the decision as found in the New York Law Journal, including the typographical errors found therein.

Trial on the merits of Millan House, Inc. v. Murphy was held in October 1980, after the decision in this case by the United States Court of Appeals for the Second Circuit and after rehearing was denied by that court. As set forth in the annexed opinion, the decision on the merits in Millan House, Inc. v. Murphy vacated the preliminary injunction.

Respectfully submitted,

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APPENDIX:

OPINION OF NEW YORK STATE SUPREME COURT

IN MILLAN HOUSE, INC. v. MURPHY

TRIAL TERM, PART 18

Justice Shorter

MILLAN HOUSE, INC. v. MURPHY -- This is a proceeding for a permanent injunction limiting and controlling public demonstrations in the vicinity of and directed at the Russian Mission to the United Nations. The Mission is located on East 67th Street between Third and Lexington Avenues; and is used for both mainsterial and residential purposes. In addition, the block houses a large apartment house on each of four corners; a police precinct house; a fire department station; a synagougue; and an institution for handicapped children. The narrow four-lane street must provide for ordinary traffic and traffic inciden-

tal to the special uses described as well as a crosstown-bus line.

The case was initiated in Juen, 1971 when a temporary injunction was sought, based on the following major allegations:

1. That the acts of the defendant, Police Department, (such as stop and inquire, search and seizure) which were used to control demonstrations in the vicinity of the Soviet Mission were contrary to law.

2. That the defendants, other than the Police Department, have engaged in:

a. Excessive picketing in the vicinity of East 67th Street and Lexington Avenue,

b. Blocking traffic,

c. The use of amplified sound, creating deafening noise in addition to loud chanting, booing, shouting, etc.,

d. Picketing in the vicinity before 9 A.M. and after 6 P.M.

e. Littering in the general area,

f. Congregating in large numbers in one area.

A temporary injunction was, in fact, issued by Justice Dollinger on July 6, 1971 which provided among other things:

1. That picketing in the immediate vicinity of the Soviet Mission shall be limited to twelve persons acting in a peaceful and orderly fashion subject to the identification and reasonable search by the Police Department prior to gaining access to the immediate Mission vicinity.

2. That defendants are restrained and enjoined from blocking traffic.

3. That defendants are restrained and enjoined from using amplified sound, engaging in loud chanting, booing, shouting, stamping of feet, clapping of hands, singing and sounding of horns or making any menacing or obscene gestures directed

at persons within the Soviet Mission or persons entering or exiting from said Mission.

4. That defendants are restrained and enjoined from littering streets in the area.

Now, nine years later, the matter of a permanent injunction is forced on for hearing. We are satified that the grounds urged as justification for a temporary injunction in 1971 were true at that time. We are further satisfied that during the nine-year continuance of that order (and in part due to its existence) the resulting conditions have been tolerable to the petitioners, to the public, and to government authorities, despite some occasional abuse. I have noted two shootings and one bomb incident directed at the Soviet Mission by persons not identified with a demonstration.

Today, the passage of time and the peculiar interplay of party interests has arrayed defendants Student Struggle for Soviet Jewry, and Glenn Richter de facto against all other parties. Moreover, circumstances have enlarged their role from thwarted picketers to symbolic defenders of the rights of freedom of speech and assembly.

The same circumstances have arranged the other parties in a loose coalition which has presented evidence to this court as follows:

1. Vandalism, violence, and gross breach of peace are imminent and inevitable upon termination of the Dollinger order.

2. Violent groups frequently infiltrate and corrupt lawfully conceived demonstrations.

3. Amplification of sound cannot be

scientifically controlled or anticipated and is practically barred by the special use and physical nature of the block.

4. Without a continuing injunction police power will be strained both budget-wise and security-wise to the danger of the public, the police and the picketers.

5. By international treaty as crystalized in 15 USC 112, demonstrations within 100 feet of the Russian Mission are absolutely forbidden (United Nations Charter, Article 105; Vienna Convention on Diplomatic Relations, Article 22).

6. That by the rule of collateral estoppel, all issues in Concerned Jewish Youth v. McGuire (621 F. 2d 421 [2d Cir., 1980]).

7. Invasions of privacy (such as stop and inquire of local residents) are evils necessarily attendant upon emotional demonstrations.

This last point was not presented as vigorously at this trial for a permanent injunction as it was on the motion for a temporary injunction.

An injunction pendente lite has no compelling effect on the trial judge. It is not the law of the case (CPLR 6314; Rosemont Enterprises, Inc. v. Irving, 49 A. D. 2d 445, 375 N.Y.S. 2d S64; Arnold Bakers v. Strauss, 45 Misc. 2d 331, 256 N.Y.S. 2d 829). An entirely distinct body of law and legal concepts governs the issuance of a permanent injunction. Chief among those present is whether authority exists for permanent prior restraint of free speech or assembly. The weight of authority is against the exercise of such equitable power (Organizations for a Better Austin v. President and Comm'rs of Princess Anne, 393, U. S. 175; Nebraska Press Assn. v. Stuart, 427 U. S. 539).

The principles embodied in Federal Statute, 18 USC 112, have been affirmed by other courst as a constitutional exercise in international relations (cf. Friend v. U. S., 100 F 2d 691 [D.C. Cir.], cert. denied 306 U. S. 640). However, since its enforcement is an obvious encroachment on freedom of assembly, and indirectly on freedom of speech, the Police Department must enforce it narrowly. It merely creates an island of security (or, in police terms, "restricted area"), measuring 100 feet from the center point of the outer gate of the Russian Mission. Within that area some reasonable police inquiry or search is recognizable.

As an additional case for permanent restraint, the police bring forward evidence of frequent infiltration of disciplined demonstrations by violent or irresponsible individuals. Whether the antic-

ipated infiltration proved factual or imagined, a reaction of blanket repression would be immoral. Any argument which reductio ad absurdum enables undefined irresponsible conduct of unidentified and perhaps yet unborn individuals to undermine the entire structure of free speech, is frightening and unacceptable.

We have been referred to the matter of Concerned Jewish Youth v. McGuire, supra, as decisive of this case. A classic instance of collateral estoppel would present identity of issue in the two cases; and identity or close privity of the party against whom the doctrine is applied (S.T. Grand, Inc. v. City of New York, 32 N. Y. 2d 300, 344 N. Y. S. 2d 938; Schwartz v. Public Administrator, 24 N. Y. 2d 65, 298 N. Y. S. 2d 955; Parkland Hosiery Co. Inc. v. Shore, 99 S. Ct. 645). The crucial thrust is that the party against whom it

is used must have had a full opportunity to litigate the issue in the proceeding previously determined. Here neither element was present. Neither the Student Struggle for Soviet Jewry nor Glenn Richter was party to the Federal proceeding; and the distinguishing issue in this proceeding is the concept "permanent."

I cannot entertain an argument that any branch of government has the capacity to confer on extra-nationals a permanent status overriding the inalienable rights of our own nationals. We are highly concerned with the plight of the local non-demonstrating residents, their exposure to stops and searches, and the intermittent interference with their security, quiet, and privacy. The Court recognizes the individual pursuit of happiness as a fundamental right. Unfortunately it is secondary to the right of freedom of speech and

assembly. "If the provisions of the Constitution be not upheld when they pinch as well as when they comfort, they may as well be abandoned." [Home Building and Loan Ass'n v. Blaisdell, 290 U.S. 398, 483, dissent].

It does not require fine research of American annals to document our persistent reverence for inherent freedoms.[1] Freedom of speech is not merely the right to shout from a remote mountaintop or even an immediate soapbox. To be significant, it must embrace the right to gather with people of like beliefs; the opportunity to confront the target and the public; and the opportunity to persuade the target and the public by lawful means.

Freedom of speech implies the right freely to utter and publish whatever a citizen may please with immunity from legal censure and punishment for the publi-

cation as long as it is not harmful in its character when tested by such standards as the law affords. (People v. Pilkington, 199 Misc. 665, 103 NYS2d 64; Kline v. McBride, 170 Misc. 974, 11 NYS2d 674). It is in the American tradition to allow the widest room for discussion and the narrowest range for its restriction, particularly when the right is exercised in conjunction with peaceful assembly. (cf. Thomas v. Collins, 323 US 819, 65 S. Ct. 557, 89 L. Ed. 630).

The inalienable rights of freedom of speech and assembly are without peer. Only after recognizing this absolute priority can we dare to balance equities, ever mindful of a continuing presumption against encroachments.

Accordingly, our decision is as follows:

The freedoms of speech and assembly affirmed as they are by history and by statute cannot be expunged or diluted. They cannot be the subject of permanent prior restraint.

The Dollinger temporary order which was designed and promulgated to meet vivid existing emergencies is obviously voidable. It has been unreasonably prolonged for nine years and distorted into a policy applicable both to unpredictable future circumstances and to nonparty entities. It is herewith terminated (cf. Dennis v. U. S., 34 U.S. 494).

The police shall facilitate, not more than once a month, and not necessarily for the parties named herein,

(1) a symbolic approach to the Russian Mission on due notice and subject to reasonable strictures imposed by the police;

(2) a silent and immobile vigil of not more than twelve persons directly in front of the Synagogue during hours when there is no religious service or holy day and when the 67th Street entrance is not being used in planned Synagogue activity.

In each of these special-notice situations, police procedures applicable within the Federally restricted 100-foot area shall apply.

As indicated above, we recognize the obligation of the police to enforce the 18 USC 112 100-foot zone as narrowly construed herein. The police may further in exercise of thei. own reasonable powers delcare a frozen zone of narrower limits on the sidewalk immediately adjacent to the entrance to a foreign mission; and may within that area, when necessary, apply extraordinary police measures of stop and inquire, or search and seize.

The police shall not interfere with lawful demonstrations between 9 A.M. and 6 P.M. at the Third Avenue end of the northern sidewalk of East 67th Street where the number of participants are twenty-five or less. Testimony at trial concerning the optimum number ranged from five to sixty. Witnesses for both sides mentioned the number forty. The court has taken into account its personal survey of the site in the presence of counsel for all parties.

We have made no specific rulings as to demonstrations at other locations on this block. The testimony reveals them to be impractical from the picketers' viewpoint or impossible from a routine police viewpoint. Those locations have not been presented to the court as sharp issues. Spillover problems are also left to police routine.

This brings us to the matter of amplification. There is no inherent, constitutional, or statutory right to amplify. (Kovacs v. Cooper, 336 U.S. 77; Saia v. New York, 334 U.S. 558). The Dollinger order having been terminated, the question resolves itself as one of reasonable police procedure subject to currently existing standards in place at the time of any application; and subject to existing penalties for abuse.

The testimoney convinces us that even though sound-in-being may accurately be measured in decibels there are no effective scientific methods by which to anticipate the actual effect of a given amplifier. The testimony also establishes that the physical layout and special uses of East 67th Street between Third and Lexington Avenues (even absent the Russian Mission) present problems to routine

Police oversight.[2]

Applications for amplification permits fall within the ambit of routine police activity; and must be processed fairly and diligently under generally applicable standards bearing in mind all preceding factors including the geography of East 67th Street.

Conduct in keeping with the foregoing opinion will prove no more restrictive to First and Fourth Amendment rights than is essential for the furtherance of legitimate government goals.

Submit findings and final order on notice.

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(1) The historic and inalienable rights of life, liberty, and the pursuant of happiness are affirmed in our Declaration of Independence. The Preamble to the Constitution sets as a primary goal "to secure the blessings of Liberty for our-

selves and our posterity." The Bill of Rights at Amendment I prohibits interference with ". . . freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievance", and at Amendment IV bans unreasonable search and seizure. The New York State Constituon reaffirms these principles at Sections 8 and 9 of Article I. Even the somewhat repressive statute 18 USC 112 pays lip service to the need to safeguard freedom of speech and assembly; and to the heavy burden of proof resting upon any person seeking to impose restraints thereon. The ultimate question cannot be avoided. Where does freedom of speech and assembly stand vis-a-vis problems of police power, international relations, and the individual's right to life, liberty, and the pursuit of happiness?

(2) Practical considerations vie for our attention. The police budgetary problem is horrific with 25 percent, or 72 man-years annually of local precinct manpower allotted to security of the Russian Mission; and City-wide $10,000,000 allotted for general foreign missions security. This however pales in significance when directly opposed to ensuring effective freedom of speech. Perhaps special budget aid should be negotiated with the U.N. or the Federal Government.

More immediate is the day-to-day police difficulty in protecting all persons involved in confrontation including the innocent bystanders. The police have been much put upon throughout this situation and nevertheless have displayed efficiency, conscientiousness and imagination under stress. At times the court wished that the patience, impartiality and flexi-

bility of a Deputy Inspector Clifford could be embodied in the law. Here again the working problem must give precedence to the principle. Can there be permanent prior restraint of free speech?